

OFFICE OF THE CITY ATTORNEY

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2007-005

January 22, 2007

Re: HB-172

To: Representative Margaret H Campbell and House Judiciary Committee Members

EXHIBIT 5  
DATE 1/22/07  
HB 172

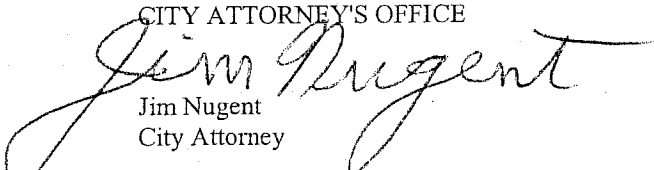
The City of Missoula has several concerns about HB-172 entitled *AN ACT PROVIDING THAT A STATEMENT BY A PERSON DURING CUSTODIAL QUESTIONING IS PRESUMED TO BE INADMISSIBLE IN EVIDENCE UNLESS IT IS ELECTRONICALLY RECORDED PROVIDING GROUNDS FOR REBUTTAL OF THE PRESUMPTION AND REQUIRING PRESERVATION OF THE RECORDING* including:

- (1) The proposal applies anywhere to traffic as well as non-traffic criminal violations;
- (2) Some statements currently admissible pursuant to case law will not be admitted and offenders will go free;
- (3) HB-172 will be a breeding ground for defense attorneys generating motions and briefs to suppress statements and/or dismiss cases by arguing factual circumstances arising out of initial law enforcement contact with offenders as to: (a) what constitutes a "statement"; (b) what constitutes either "custodial" and/or "questioning" and/or "custodial questioning" when the words are combined; (c) what constitutes "electronically recorded in its entirety" if some comments are made during initial contact by law enforcement prior to recognizing a need for a recording; (d) does any conversation involving law enforcement constitute questioning; and (e) if the person asserts they were not or did not feel that they were free to leave does it constitute "custodial questioning".
- (4) Prosecutors and law enforcement will spend a lot of time preparing and writing briefs arguing what adequately constitutes several factors and/or aspects of the proposed statutory language as to what constitutes "clear and convincing evidence that the statement was voluntary and reliable and that the law enforcement officer or officers conducting the questioning had good cause for not electronically recording the custodial questioning."
- (5) Practically speaking will law enforcement officers have to always have a tape recorder operating in their pocket or on their lapel whenever they have a conversation with any non-law enforcement individual?
- (6) What will be the cost of providing "a true, complete, and accurate copy of the electronic recording" and what form may it take? Who will pay the cost?
- (7) How is this proposed statutory provision to be reconciled with current Mont. Code Ann. § 46-5-401, Montana's stop and frisk statute? Does it implicitly amend it?
- (8) How are the additional costs generated or caused by HB-172 to be funded?

Not only will HB-172 potentially set free criminal offenders who currently could be prosecuted; but it will increase workloads and be quite costly to law enforcement and local governments. Please take these concerns into account when considering HB-172. Thank you.

Sincerely,

CITY ATTORNEY'S OFFICE

  
Jim Nugent  
City Attorney

pc: Missoula County Representatives